BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of Shell Oil Company, Incorporated, a corporation, plaintiff-appellant, v. Manley Oil Corporation, a corporation, et al., defendants-appellees, which petitioners here seek to have reviewed, is reported in 124 Federal 2nd, at page 714 (Federal Reporter, Second Series, Advance Sheet, February 23, 1942, page 714), and appears on pages 270 to 275 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioners' petition for a writ of certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts, on points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERRORS TO BE URGED.

The United States Circuit Court of Appeals for the Seventh Circuit, in its said opinion in said cause, erred:

(1) In holding and deciding that the words, "surface only, subject to a certain deed to Benton Coal Company," had a well-defined meaning;

(2) In holding and deciding that the words, "surface only, subject to a certain deed to Benton Coal Company," etc., when used as the subject of conveyance, were not

ambiguous, had a definite, certain meaning, that is, the top of the soil for its ordinary and usual uses;

(3) In holding and deciding that words which are incapable of definition, when used as descriptive of an estate conveyed, are of definite and certain meaning under the laws of Illinois, and that the trial court erred in receiving extrinsic testimony for the purpose of arriving at the intention of the grantor in said deed at the time of the conveyance;

(4) In assuming jurisdiction to decide and determine the law that should be applied in the interpretation of instrument of conveyance of lands in Illinois, in the absence of statute or judicial decision in the State of Illinois, upon the question presented.

SUMMARY OF THE ARGUMENT.

I.

The decision in this case is governed by the laws of the State of Illinois. The Circuit Court of Appeals, sitting in review, was called upon to interpret and apply the law of Illinois. It was not the province of the Court of Appeals to establish law in Illinois.

The Circuit Court of Appeals said in its opinion that, "Since the Illinois Courts have not passed upon this question, we accept the rule as set forth in the Jividen case from Ohio rather than the Ramage case from West Virginia."

The Circuit Court of Appeals, having found that the Illinois courts had not passed upon the question presented, exceeded its province in undertaking to adopt as the law of Illinois the rule laid down in the Jividen case by the courts of Ohio, but should have relegated the question to the courts of Illinois for decision. An examination of the case of Anderson v. Pryor, 51 Ohio Appellate 35, leads us to insist that the courts of Ohio are not in accord on this question.

II.

If the Supreme Court of Illinois has not spoken on the question presented, and the courts of other states are in conflict as to the meaning of the term used, as is evidenced by the conflicting decisions in the courts of Ohio and West Virginia, then unless the question is referred to the Illinois courts for determination the only logical conclusion would be that we have an ambiguous phrase here used as descriptive of an estate conveyed, an expression so indefinite in meaning that learned courts of review in other jurisdictions have disagreed upon its meaning. Therefore, we must go back to the guiding star in construction, as set

forth in the case of Magnolia Petroleum Company et al. v. West et al., reported in 374 Ill. 516, at page 520, namely, the intention of the parties to the instrument. And in arriving at that intention the Court may, and should, resort to extrinsic testimony to ascertain, if possible, the true intent of the parties.

III.

The decision with which the federal court is faced in the instant case calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statute nor decision of Illinois have been pointed to which are clearly applicable. The difficulties of determining just what should be the decision under the law of that state are persuasively indicated by the different results reached, in this case, by the United States District Court and the Circuit Court of Appeals. Coupled with the recognized conflict of the reviewing courts in the State of Ohio and the State of West Virginia, that have attempted the determination of the question involved.

Therefore, "unless the matter is referred to the State Courts, upon subsequent decision by the Supreme Court of Illinois, it may appear that rights in local property of parties to this proceeding have, by the accident of Federal jurisdiction, been determined contrary to the Law of the State which in such matters is Supreme."

Thompson v. Magnolia Petroleum Company, 309 U. S. 478, at page 484, 84 L. Ed. 876, at page 881;

Railroad Commission of Texas v. Pullman Company et al., 61 Supreme Court Reporter 643-646.

IV.

The words "surface only, subject to a prior conveyance of the coal," etc., when used as descriptive of the estate conveyed, do not have a definite, settled legal meaning.

Ramage v. South Penn Oil Company, 118 S. E. 162-171, Note 31 A. L. R. 1530;
Bogart v. Amanda Consolidated Gold Mining Company, 32 Colo. 32-36;
Anderson et al. v. Pryor et al., 199 N. E. 364-368, 51 Ohio Appellate 35;
Dolan v. Dolan, 73 S. E. 90-92;
Myher v. Myher, 224 Mo. 631-638.

V.

The primary purpose in construing a deed is to ascertain the intention of the parties, and while this intention is to be gathered from the instrument as a whole, giving effect to every word and rejecting none as meaningless or repugnant if this can be done without violating a positive rule of law, the words need not be construed literally or strictly, as greater regard is accorded to the real intention as manifested in the entire deed than to any particular word or arrangement in its expression.

In order to understand the language of a deed in the sense intended by the parties the Court will consider the facts they had in mind, including their situation, the state of the property and the objects to be attained, giving effect to the intention so disclosed if it is consistent with the language used.

Magnolia Petroleum Company v. West, 374 Ill. 516;
Woods v. Seymour, 350 Ill. 493-496;
Hubbard et al. v. Goin, 137 Fed. 822-830.

The words in a deed need not be construed literally or strictly.

Kearney v. Kirkland, 279 Ill. 516-524;
McCoy v. Fahrney, 182 Ill. 60-65.

Where the language of a contract is uncertain or ambiguous, evidence of usage is admissible to show the intention of the parties.

Lynn and Company v. Culbertson, Blair & Company, 83 Ill. 33-36;
Steidtmann v. Joseph Lay Company, 235 Ill. 84-88;
17 Corpus Juris, Sec. 60, p. 497.

ARGUMENT IN SUPPORT OF PETITION.

I.

IMPORTANT QUESTION OF LOCAL LAW INVOLVED.

We present this question first because we realize that the attention of this august Court should not be diverted from the arduous duties imposed upon it, unless the question presented for determination is more than trivial.

The evidence in this record discloses (testimony of W. W. McCreery, Tr. 124) that the titles of hundreds of land owners rest upon just such a conveyance as the one involved in this suit. And with the rapidly developing oil explorations in this area, with its many discoveries of valuable deposits of oil and gas, the correct decision of the question presented by the petition filed herein have more than an academic interest, and present as well a practical question, not alone of importance to the litigants involved in this suit, but also of far-reaching importance to many citizens of the State of Illinois.

It is because of this importance, therefore, that we, through this petition, appeal to the sound judicial discretion of this Honorable Court, in the ardent hope that the question presented may have the consideration of this Court.

II.

In view of the importance of the question presented the jurisdiction of this Court is invoked under Section 240 of the Judicial Code and that portion of subsection B of paragraph 5 of Rule 38 of Revised Rules of Supreme Court of the United States, as follows:

> "Where a Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions."

Although the proper construction and interpretation of the language used in the deed in question is primarily one

for the courts of Illinois, and while cases are pending in the lower state courts upon this question, the Supreme Court of Illinois has not decided the question here presented.

In support of this statement we quote the language found in the opinion of the Honorable Circuit Court of Appeals in this case (Tr. 270-275): "Since the Illinois courts have not passed upon this question, we accept the rule as set forth in the Jividen case from Ohio rather than the Ramage case from West Virginia."

The learned District Judge in his opinion said (Tr. 172): "It is quite clear that no statute or court decision in Illinois supplies the 'rule of decision' in this case. Nor have the words 'surface' or 'surface only,' when used in a deed conveying land as descriptive of the estate conveyed acquired a settled meaning in this state."

The above conclusion, reached by the District Court and Court of Appeals, brings us at once within the scope and purview of the language of the Supreme Court of the United States in the case of Thompson v. Magnolia Petroleum Company, 309 U. S. 478; on page 484 of the opinion we quote:

> "Decision with which the Federal Court of Bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two circuit courts of appeals that have attempted the determination. Unless the matter is referred to the State Courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have, by the accident of Federal Jurisdiction, been determined contrary to the law of the State which in such matters is supreme."

In the case at bar the different results reached by the learned District Judge and the Honorable Court of Appeals, coupled with the conflicting decisions of the reviewing courts of Ohio and West Virginia, as evidenced by the Jividen case and the Ramage case, persuasively indicate the difficulties of determining just what should be the decision under the law of Illinois.

In this connection, also, we call the Court's attention to the lucid and scholarly statement in the opinion delivered in Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, on page 500. We quote:

> "In this situation a federal court of equity is asked to decide an issue making a tentative answer which may be displaced tomorrow by a state adjudication."
>
> "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court."
>
> "An appeal to the Chancellor is an appeal to the 'exercise of the sound discretion which guides the determination of courts of equity.'
>
> "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play."

III.

The meaning of the deed from McKemie to Mooneyham, set out in the petition filed herein, and the construction and interpretation of the words and terms therein used are governed by the law of Illinois.

> Erie Railroad Company v. Tompkins, 304 U. S. 64;
> Thompson v. Magnolia Petroleum Company, 309 U. S. 478.

In the case of Magnolia Petroleum Company v. West, 374 Ill. 516, 30 N. E. (2nd) 24, the Supreme Court of Illinois said:

> "The primary purpose of the construction of a deed is to ascertain the intention of the parties, to be gathered from the instrument as a whole, giving effect to every word and rejecting none as meaningless or repugnant, if this can be done without violating a positive rule of law."

And again in the case of Kearney v. Kirkland, 279 Ill. 516, 117 N. E. 100, the Illinois Supreme Court says:

> "The words need not be construed literally or strictly, since greater regard is accorded to the real intention, as manifested in the entire deed, than to any particular word or arrangement in its expression."

In the cases of Goodwillie Company v. Commonwealth Electric Company, 241 Ill. 42, 89 N. E. 272, and Waller v. Hildebrecht, 295 Ill. 116, 128 N. E. 807-809, the Supreme Court of Illinois said:

> "In order to understand the language in the sense intended by the parties, the Court will consider the facts they had in mind, including their situation, the state of the property and the object to be attained."

In the light of the foregoing propositions of law, let us examine the facts, and we find:

That on August 27th, 1907, Thomas M. McKemie, a farmer by occupation, being the owner of the surface of a given tract of land (the coal was previously sold) (oil unknown in the community), sells to his brother-in-law, Mooneyham, the two acres in question as the building site for a home.

Note in this connection also the affidavit of Thomas M. McKemie (Tr. 161): That on the 27th day of August, 1907,

he sold and conveyed to Walter S. Mooneyham, by warranty deed (the lands involved), and delivered to said Mooneyham the possession of said two acres, and that he has never, since August 27, 1907, claimed any right, title or interest in said two acres.

Under the facts there can be no controversy about the intention of the grantor in said deed.

IV.

It is contended by respondent, plaintiff-appellant below, that the words of the deed are so clear and have such a well-settled legal meaning under the laws of Illinois, and that that meaning so plainly limits the conveyance to the top soil that the instrument must be interpreted solely from the language therein found.

On the other hand it is petitioners' contention that the word "surface" and the words "surface only," when used in a deed made subject to a prior conveyance of a specific mineral, such as coal, not only lack precision in meaning, but have by custom and usage in the locality where the lands are located, acquired a meaning that is broader than their dictionary definition, and, properly construed, carry to the grantee all of the interest the grantor has left in the land. That extrinsic evidence is admissible to show such custom and usage and otherwise to show the intended meaning of the words as used by the parties to the deed.

Inasmuch as no statutes or court decision in Illinois supplies the "rule of decision" in this case, and the courts in other jurisdictions are not in agreement upon the meaning of the term "surface," as used in contracts, wills and deeds of conveyance (see Annotation 31 A. L. R. 1530-1533), the Court has no alternative but recurrence to the fundamental canon of construction of instruments—the intention of the parties.

In the leading case of Ramage v. South Penn Oil Company, 118 S. E. 162, 31 A. L. R. 1530-1533, the West Virginia Supreme Court of Appeals held that the term "surface," when used as the subject of a conveyance, is not a definite one capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it; and in determining its meaning regard may be had not only to the language of the deed in which it occurs, but also to the situation of the parties, the business in which they are engaged, and to the substance of the transaction. The opinion in that case is enlightening in its discussion of various items of extrinsic evidence considered pertinent as throwing light on the intended meaning of the word "surface," as used in the deed in that case.

The term "only," as used in the deed in question, neither enlarges nor diminishes the term "surface" when used in connection therewith.

Inasmuch, therefore, as the term "surface only" has not been given a settled legal meaning in the State of Illinois, and in view of the difficulty of giving to the words used a definition that is capable of universal application, as announced in the Ramage case (supra), brings the case at bar directly within the rule announced by the Supreme Court of Illinois in the case of Magnolia Petroleum Company v. West (supra), and a long line of other supporting cases.

That where the terms used in a deed are ambiguous and have no settled meaning extrinsic evidence of the facts and circumstances surrounding the transaction in which the deed was given, as well as evidence of the contemporaneous or subsequent acts of the parties, is admissible to enable the Court to ascertain the intention of the parties to the deed.

CONCLUSION.

The Circuit Court of Appeals has wholly disregarded the canon of construction adopted by courts of Illinois, has by its decision arbitrarily adopted the rule of law announced by the courts of Ohio, and has thereby assumed to establish the law in Illinois, upon a question of far-reaching importance, and one in which the law announced by the state courts is alone supreme.

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over the judgments and decrees of the Circuit Court of Appeals in order that the errors committed by the Circuit Court of Appeals may be corrected. That these petitioners may have the benefit of the rights to which they are entitled under established law; this petition should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals and enter its judgment affirming the decree of the District Court, or directing such procedure as this Honorable Court deems necessary to have the legal question involved presented to the state courts of Illinois for decision.

Respectfully submitted,

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